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IN THE

Supreme Court of the United States

NO. 948

IRENE SMITH CLIETT, *Petitioner*

v.

MAMIE SCOTT HAMMONDS, ET AL., *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opinion of the United States Court of Appeals for the Fifth Circuit, to which the Writ of Certiorari is herein sought by petitioner, is reported in 186 Fed. 2d 471, and a copy of the same is incorporated as Appendix I in the subject petition for Writ of Certiorari to this Honorable Court (pages 43-48).

Questions Presented By Petitioner

The propositions or questions presented by the petitioner, when hypothesis not applicable here are removed therefrom and the same are succinctly stated, appear to respondents to present the following questions:

1. Does the Court have the authority to determine, as a matter of law, whether a motion under Rule 60(b) states a cause of action as well as whether or not the relief therein sought is precluded by the limitations contained in such Rule; or is the Court required to retry and redetermine the issues of fact upon which the judgment complained of was predicated and which were theretofore determined, regardless of whether or not the motion states a cause of action under such Rule and whether or not the movant or petitioner is precluded from any relief from such prior judgment by reason of the limitations imposed upon the granting of such relief in and by the provisions of said Rule 60(b)?

2. If in anywise applicable here, does old Federal Equity Rule 70½ invalidate the judgments complained of in the instant motion under Rule 60(b), notwithstanding the provisions of Federal Rule 15(b), as to the findings and judgments in 1939 relating to partnership?

3. Were the findings and judgments relating to partnership made and entered in 1939 and since, and challenged in the subject motion under Rule 60(b), are void; regardless of the petitioner's duty and burden to establish the relevant facts relating to a proper use of partnership funds by the pettitioner for the acquisition of lands, the equitable and beneficial title to which were in such cases to be determined?

4. Was the burden of proof upon petitioner in 1938 to show that lands purchased with partnership funds were not partnership lands, under Texas law?

5. Did the matters before the District Court on February 19, 1952, support the summary judgment against petitioner's claims of title by adverse possession, asserted under the Texas Statute?

6. Was the February 19, 1952, judgment of the Court granting summary judgment against petitioner's claims of title under the Texas law of adverse possession decided solely upon the basis of selected recitals in an abandoned pleading of the petitioner, and therefore void?

Statement

1. The original and *first* judgment, chronologically, the petitioner seeks to have invalidated was the judgment of the Court of Civil Appeals, Fifth Circuit, rendered June 22, 1936 (84 Fed. 2d 49); and wherein the finding by the trial court of the existence of a partnership between petitioner and the then late George Scott was affirmed, and the case was remanded with directions that a representative of George Scott be made a party and for further evidence with respect to the interest of the partners in the partnership and "for further proceedings not inconsistent with this opinion."

The *second* judgment petitioner seeks to invalidate was that of the District Court, after remand, in Equity Cause No. 639, and which was tried upon the evidence presented at the first trial thereof and after the petitioner declined to present any further evidence with respect to the partnership affairs as directed by the United States Court of Appeals, aforesaid. This judgment determined that the petitioner owned an undivided one-half interest in the subject lands and the heirs of George Scott, collectively, owned the other undivided one-half interest therein. This judgment was affirmed March 13, 1939. (102 Fed. 2d 725)

The *third* judgment herein sought to be set aside was rendered by the United States District Court February 19, 1952. (102 F. Supp. 440, aff. 233 Fed. 2d 269; Cert. den. 352 U.S. 917) Therein summary judgment against petitioner's claim of acquisition of title to the undivided one-half interest of the Scott heirs in the lands which were the subject matter of Equity Cause No. 639 (which was concluded in 1939), under the adverse possession and limitation laws of the State of Texas, were denied, for the reasons set out in the memorandum opinion of the District Court, a copy of which appears in the petitioner's petition to this Court herein at pages 55-64.

Subsequent to the final affirmance of the aforesaid judgment of February 19, 1952, the Court concluded and confirmed a partition of the lands constituting the subject matter thereof (as well as of the Equity Cause No. 639 of 1939) between the petitioner and the heirs of George Scott; and writ of possession as to the lands partitioned to the Scott heirs was issued and executed in their favor. Subsequently, and on July 8, 1958, the petitioner and her sister, Lucy Mayberry, their agents, servants, tenants, employees, attorneys and all persons acting in concert or participating with them or either of them were permanently enjoined and restrained from directly or indirectly—

> "(a) going upon, building, removing, damaging or cutting fences thereon or enclosing the same or using, exercising dominion over, working, running cattle upon, or doing any acts or engaging in any conduct incident to the ownership of all that certain tract of land situated in Waller County, Texas, and particularly described in paragraph 4, Petitioners' Complaint herein, as 'Part No. I', particularly described as follows, to-wit: (describing the lands therein set apart to the heirs of George Scott)
>
> * * *

"(c) filing or instituting or from causing to be filed or instituted any suit or judicial action against the Petitioners Mamie S. Hammonds, Reed Scott, Bertha Scott and Essie F. Scott individually and as Independent Executrix of the Will and Estate of Jeff Scott deceased, their tenants, heirs or assigns respecting or relating to said Petitioners, their heirs or assigns, title to or right of possession of said 349,755 acres of land hereinbefore particularly described; . . ."

Such judgments so granting such injunction was affirmed by the United States Court of Appeals. (265 Fed. 2d 933)

In reply to the complaint upon which the above said injunction was predicated, the petitioner, Irene Smith Cliett, asked the Court, among other things, "to set aside and make null and void the infamous conveyance which was the result of a gross miscarriage of justice on March 14, 1938, in Judge Robert T. Ervin's court, made in Cause No. 639," for the reasons therein set out. And therein petitioner introduced a part of the transcript of the proceedings before Judge Ervin in 1939 and called, as her witness, and examined Larry Morris, Esq., the attorney who represented her in said Cause No. 639 in 1938 and such witness testified concerning such proceedings.

On November 26, 1958, the petitioner filed the original of her motion under Rule 60(b) here under consideration, and on December 23, 1958 argued the same to the District Court and obtained an order directing that such motion be incorporated in the record of the then pending appeal from the injunction judgment; and in the United States Court of Appeals, the subject of such motion was presented in extenso, but was not passed on by that court (265 Fed. 2d 933).

Pleadings and Motions of These Respondents

2. These respondents, Mamie S. Hammonds, Reed Scott and Essie F. Scott, in reply to petitioner's motion under Rule 60(b) herein, filed—

(a) Their *motion to dismiss* the petitioner's said motion under Rule 60(b) *or for summary judgment* against her thereon, upon the ground and for the reasons that—

(i) Said complaint or motion of petitioner failed to state a claim against these respondents upon which relief could be granted.

(ii) It appearing on the face of petitioner's said motion that the judgment in Equity Cause No. 639 became final on March 14, 1939, and more than one year before Rule 60(b) was amended on March 19, 1948, so as to and incorporating therein the provisions of Rule 60(b)(6); any relief thereunder was expressly precluded by the provisions of said rule.

(iii) It appearing on the face of the motion that the "misapprehension", "misadventure", "inadvertence", "mistake" and/or "excusable neglect" in said motion alleged as the grounds for the relief therein sought were matters clearly within the contemplation of the provisions of Rule 60(b)(1), and more than one year having elapsed from the resulting judgments complained of, no relief sought could be obtained thereunder by reason of the express limitation of said Rule 60(b).

(iv) Assuming that petitioner's motion was sufficient to allege any fraud, misrepresentation or misconduct on the part of the Scott heirs which contributed in anywise to the entry of the judgments complained of, and (for the purpose of such motion only) assuming that such parties were guilty of any such conduct; relief therefrom was controlled by subdivision

(3) of Rule 60(b), and it appearing on the face of such motion that such conduct occurred, if it did, more than one year prior to November 26, 1958, relief from such judgment by reason thereof was precluded by the limitation imposed by said Rule.

(v) Assuming that respondents (the Scott heirs) did not plead the facts relating to any partnership between the petitioner and the late George Scott in Equity Cause No. 639, since the subject motion of petitioner did not allege that she excepted to the pleadings in such particulars or objected to the admissions of evidence upon the issue of partnership in said Cause No. 639; the provisions of Rule 15(b) of the Federal Rules of Civil Procedure concluded that the pleadings in said Cause No. 639 on such issue would be considered amended so as to raise and include the same.

(vi) That the matter of insufficiency of pleadings on the issue of partnership in Equity Cause No. 639 were and are within the contemplations of subdivisions (b)(1) and (b)(3) of Rule 60(b); and the one year limitation filed the time within which petitioner might have sought relief by reason of such insufficiency.

(vii) That in all events, petitioner's motion for relief was not filed "within a reasonable time", within the contemplation of Rule 60(b).

(viii) It appearing on the face of said motion that the judgments in Equity Cause No. 639 (84 Fed. 2d 48 and 102 Fed. 2d 725) and the judgment in Civil Action No. 6058 of February 19, 1952, (233 Fed. 2d. 269) in said motion sought to be set aside and nullified, were each and all rendered and became final more than one year prior to the filing of petitioner's motion herein, and the issues and causes of action complained of in said motion herein, at the time of its filing, were matters res adjudicata; and any and all relief from the same were and are precluded by the express provisions of Rule 60(b).

And therein these respondents move the Court to dismiss petitioner's said motion and in the alternative that summary judgment be entered upon said motion denying the relief therein sought by petitioner. This motion of these respondents is a part of and found at pages 68-75 of the Unprinted Record in Cause No. 18,389, *Irene Smith Clett, appellant v. Mamie S. Hammonds, et al., appellees*, in the United States Court of Appeals, Fifth Circuit (Tr. 32).

(b) Without waiving their motion to dismiss or for summary judgment thereupon, these respondents replied to the petitioner's original motion herein, and in said reply, in part,—

(i) Denied all the allegations and conclusions contained in paragraph I and 1-a of said motion;

(ii) Denied all the allegations and conclusions in paragraph II of said motion;

(iii) Denied, in part, the allegations in paragraph III 1 of said motion and denied that counsel for the Scott heirs had at any time imposed upon or mislead the court or petitioner's counsel in Equity Cause No. 639; and alleged that the issue of partnership was tried and determined in said cause not only with the implied consent but with the express consent of the petitioner.

(iv) Alleged that from March 19, 1938 to the year 1956, the petitioner was a married woman and under the laws of the State of Texas was incapable of the acquisition of the Scott heirs' interest in the subject lands under the Texas law of adverse possession;

(v) Denied that the petitioner was "denied a full trial and hearing" upon her claim of adverse possession; and

(vi) That any insufficiency of pleadings with respect to the existence of a partnership between the petitioner and the late George Scott could not provide any basis of petitioner's motion by reason of the provisions of Rule 15(b) of the Federal Rules of Civil Procedure; and any complaint with respect to the same was within the contemplation of subdivisions (b) (1) and (b) (3) of Rule 60(b) and the one year limitation therein prescribed applied (Tr. 21-32).

Proceedings, Orders and Judgments On Petitioner's Motion

1. The petitioner argued her motion to the District Court on December 23, 1958 and again in July, 1959, and again, on motion for rehearing on January 26, 1960. On September 29, 1959, the District Court (the Honorable Joe Ingraham presiding) entered its judgment finding that petitioner's "Motion is not well taken and should be overruled as a matter of law, and that said first amended motion of Irene Smith Cliett for relief under Rule 60(b) and the actions and claims therein asserted should be dismissed:" and entered judgment so dismissing the claims or causes of action asserted by the petitioner herein. Petitioner's motion for rehearing was denied February 2, 1960 (the Honorable Joe W. Sheehy presiding). These judgments of the District Court were affirmed by the United States Court of Appeals, Fifth Circuit.

2. These respondents urged before the Court of Appeals the propositions that petitioner's motion alleged no facts which would support the relief sought by her in her motion; that the relief sought by her was precluded by the limitation provisions contained in Rule 60(b), which the motion itself showed to be applicable; that the judgment of the District Court dismissing her said motion was

proper; and that the prosecution of such appeal by petitioner was in violation of the injunction theretofore imposed upon petitioner.

In affirming the judgment dismissing petitioner's motion herein, the Court of Appeals pretermitted the question of whether or not the subject motion was precluded by the injunction, and further pretermitted a determination of the question of whether or not this motion was barred because it was not timely filed by reason of the limitation provisions of Rule 60(b); and said: "Instead, out of an abundance of caution, we have examined the motion on its merits and find that it was properly dismissed." (Pages 43-48, Petition for Writ of Certiorari herein).

PRESENTATION OF COUNTERPOINTS

I.

The Court of Appeals was not precluded from construing the findings and judgments of the District Court and of the Court of Appeals as to the existence of the partnership in Equity Cause No. 639 by reason of the allegations in petitioner's motion that in said cause of action partnership had not been plead, the evidence therein did not support a finding of partnership and the original trial judge had not intended a judicial finding of partnership; and the Court of Appeals did not err in affirming the judgment of the trial Court dismissing petitioner's motion under Rule 60(b).

II.

The Court of Appeals did not err in finding and holding that the existence of the partnership between

the petitioner and the late George Scott, determined in Equity Cause No. 639, and appeals therein were valid; or that the judgments rendered thereon are not subject to invalidation because there was no allegations therein of the facts constituting such legal status.

(presented together)

As is shown by the petitioner's application herein and the transcript of the record before the Court of Civil Appeals; the District Court in Equity Cause No. 639 *did* find that a partnership existed between the petitioner and the late George Scott at the time of his death, and such fact was observed by the said Court of Appeals in the same case on direct appeal in said Cause No. 639 (84 Fed. 2d 489; page 50 of Petition for Writ of Certiorari herein). The selfsame fact—that such partnership had been found to exist—was observed by the District Court on the second trial of said Cause No. 639 and again by the same Court of Appeals on a direct appeal from said second trial thereof. (102 Fed. 2d 725; page 53 of Petition for Writ of Certiorari herein).

Assuming that there were no pleadings before the District Court when the issue of the existence of the partnership was evidenced by proof thereof such finding was made; such fact did not and could not invalidate such findings or the judgment of the District Court or the Court of Appeals, predicated thereon. Petitioner's motion does not allege that she objected to the District Court receiving evidence relating to such partnership or in anywise objected to a trial and determination of such issue; and, therefore, the District Court and the Court of Civil Appeals in said Cause No. 639, and this Court in this

cause, did and would consider the pleadings, as to such issue, as having been amended, if insufficient, (Fed. Rule 15(b) and a failure to amend, if there was, would not and does not effect the results of the trial of the issue so consented to be tried, or provide any grounds from the judgments therein rendered and entered. *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209; and *Gilmore v. Hinman*, 191 Fed. 2d 652.

Indeed, the District Court as well as the Court of Appeals,—in considering the sufficiency of the petitioner's motion under Rule 60(b) to entitle her to any of the relief therein sought as well as whether or not she is precluded by the limitations expressly provided in said Rule, as a matter of law,—were authorized to take judicial notice of the records of such Courts in the related cases between the petitioner and these respondents and heretofore tried, held, determined and disposed of by said Courts. (*Ellis v. Cates*, 178 Fed. 2d 791, 793, Cert. den., 339 U.S. 964, 70 S. Ct. 99). Not only were such Courts entitled to consider their records in said Equity Cause No. 739, but they were and are authorized to consider their records in all the related proceedings had in Civil Action No. 6068 and Cause No. 15,834 (233 Fed. 2d 269) and Cause No. 17,476 (265 Fed. 2d 933). 4 *Fed. Prac. & Proc.* 189; Sec. 2168.

Cases Distinguished

The opinion of the Court of Appeals in *Schilling v. Schwitzer-Cummings Company*, 142 Fed. 2d 82; is clearly inapplicable and is not authority for the proposition upon which the same is cited by the petitioner herein. This case does *not* hold that where a petition or motion is dismissed

for failure to state a claim or cause of action, or is dismissed by summary judgment, the Court is required to make and file findings. It might, very appropriately, be observed that the Court therein said: "Certainly, we should not require or encourage trial judges in preparing findings, to assert the negative of each rejected contention as well as the affirmative of those which they find to be correct."

The case of *Armour & Co. v. Alton & Co.* (312 U.S. 195, 61 S. Ct. 498) cited by petitioner is not applicable here. The District Court dismissed Armour's complaint, to which there had been no answer and upon which there had been heard no evidence; and the Court of Appeals affirmed such judgment upon the ground that the issues involved presented administrative problems, and necessitated primary resort to the Interstate Commerce Commission. There had been related litigation between the parties in that case and the Supreme Court took judicial notice thereof, and affirmed the judgment of dismissal.

Respondents respectfully submit that the holdings and judgment in *Klapprott v. United States* (335 U.S. 601, 336 U.S. 942) cited by petitioner is not in point, on fact or law, with this case. And it is believed that the opinion of this Honorable Court in *Ackermann v. United States*, supra, is conclusive of the distinction between the instant case and the *Klapprott* case.

Findings and Conclusions Herein Unnecessary

The District Court did not make and file any findings of fact or conclusions of law upon its decision and judgment dismissing petitioner's motion under Rule 60(b) herein, separately, or other than those contained in its order dismissing such motion.

Indeed, Rule 52(a) expressly provides that it is unnecessary for a court to make and file separate findings of fact or conclusions of law on decisions on motions under Rule 12 (raising any defense or objection which is capable of determination without the trial of the general issue) or under Rule 56 (summary judgment) or any other motion except as provided in Rule 41(b).

The Fathom "Hoax"

The motion of petitioner here under consideration alleges no facts with respect to any intrinsic or extrinsic fraud perpetrated by the Scott heirs in any manner, and, indeed, no such misconduct as could conceivably contribute to the rendition and entry of any judgment in such motion complained of. Petitioner presents here the proposition that the counsel for Scott heirs, in 1938, by waiving an accounting by the petitioner of the assets of the former partnership between her and the late George Scott, (other than the lands there involved) did so with design and purpose to induce the petitioner and her counsel to submit her case on the second trial of Equity Cause No. 639 to the District Court upon the record made at the first trial thereof, and thus induced her to rely upon such record and not go forward with further evidence with respect to the relative interests of the partners in such partnership assets, and caused her to rely upon the proposition that it was the burden of the Scott heirs to present evidence relating to the relative interests in such partnership—and which petitioner *erroneously* still contends is the law.

The truth is and the Printed Record in the related cause between these parties (No. 17,476, *Irene Smith Cliett and Lucy Mayberry, appellants v. Mamie S. Hammonds, et al.*

appellees, in the United States Court of Appeals, Fifth Circuit, pages 82-89, 265 Fed. 2d 933) conclusively shows that the District Judge who tried Equity Cause No. 639, after remand thereof, not only invited the petitioner to go forward with evidence relating to the relative interests of herself and the late George Scott in the partnership theretofore found by the District Court and the Court of Appeals, but advised her of her duty in such respect and urged her to so proceed; and that petitioner's counsel then acknowledged that under the Texas law, in the absence of a showing to the contrary, it would be presumed that the petitioner and the late George Scott, as partners, were equally interested in the partnership assets. As hereinbefore pointed out, the Court of Appeals, in consideration of the matters presented by this appeal, was in all things authorized to consider the records in said related cases. 3 *Fed. Prac. & Proc.* 161, Sec. 1236, notes 33 and 33.1; 4 *Fed. Prac. & Proc.* 189, Sec. 2168.

Very much to the contrary of the contention of the petitioner herein that it was the duty of the Scott heirs to go forward with the proof of the relative interest of the partners in such partnership, the laws of the State of Texas on such subject was determined, settled and announced by the Supreme Court of Texas in 1883, and has been constantly and consistently followed since. In *Martin v. Dial*, 57 S.W. 2d 75, 81 (4), the Commission of Appeals of the Supreme Court of Texas reiterated this rule of law in the following language:

> "The rule is well established that the death of one partner dissolves the partnership. The law, however, places upon the surviving partner the duty to wind up the partnership affairs. After paying all outstanding

> indebtedness, he must account to the heirs and personal representatives of the deceased partner for their interest in what remains."

As was said by this Court in *Ackerman v. United States*, supra, (71 S. Ct. 211-212), if upon the second trial of Equity Cause No. 639, the petitioner here chose to rely upon the record made at the first trial thereof, her choice was a risk, but calculated and deliberate and such as follows a free choice, and—

> "Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the Keilbar case. There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from."

III.

The question of whether or not, under Texas law, a partner has the right to take a part of partnership funds and divert the same to his personal use with the knowledge and acquiescence of the other partner was not presented to the Court of Appeals herein and it did not herein make any holding with respect to such question was rendered and judgment predicated thereupon.

IV.

The Court of Appeals was not herein required and did not herein determine the propriety or impropriety of the burden of proof in Equity Cause No. 639, in 1938, as between petitioner and the Scott heirs.

(presented together)

The records of the related cases between these parties referred to by the petitioner herein clearly show that in Equity Cause No. 639 the petitioner did not present the theory or proposition that the lands constituting the subject matter of such cause were purchased by her with partnership funds with the knowledge and acquiescence of the late George Scott, but; instead, the petitioner in said cause, and in all causes since and in her present petition to this Court, contended and contends that no partnership existed between her and the late George Scott. And these respondents observe that even after the finding of such partnership by the District Court on the first trial of said Cause No. 639 and even after such finding was affirmed and pronounced by the Court of Appeals on such first appeal, the petitioner did not amend her pleadings and allege, in the alternative or otherwise, that the subject lands were purchased by her with partnership funds with the knowledge and acquiescence of her partner, the late George Scott, and did not offer evidence thereon to the District Court on the second trial of said cause, did not seek a finding thereon and did not urge such matter before the Court of Appeals in her appeal from the judgment in said second trial.

Again, the respondents respectfully submit that the District Court and the Court of Appeals in disposing of petitioner's motion under Rule 60(b) did so properly and in accordance with the holding and language of this Honorable Court in *Ackerman v. United States*, hereinbefore referred to, and she is not entitled to any relief from her choice not to present this theory in said Cause No. 639.

In connection with petitioner's Point IV, respondents respectfully requests consideration of the matters presented under their Counterpoint II above.

V.

The Court of Civil Appeals herein did not hold or declare that the original petition filed by the petitioner in the State District Court was sufficient of itself to toll or interrupt the claimed adverse possession of petitioner of the undivided half interest of the Scott heirs in the lands constituting the subject matter of Equity Cause No. 639. But if it did so hold, such holding was not erroneous.

VI.

The Court of Civil Appeals herein did not make any holding with respect to the Texas law of recognition by an adverse claim of the title of the true owner; but merely found that the former adjudications of the petitioner's claim of title under the Texas law of adverse possession and limitation had been properly determined in prior related litigations between the petitioner and these respondents.

(presented together)

It is believed that a brief analysis of the opinion of the Court of Appeals herein will clearly demonstrate that points or propositions V and VI presented herein by petitioner are not germane or relevant; and have no basis in the opinion of the Court of Civil Appeals herein, when the same is given a fair construction and interpretation. After referring to that part of petitioner's motion for relief under Rule 60(b) relating to the theory that the District Court and the Court of Appeals were induced by deceit and fraud and mislead (in Equity Cause No.

639) to hold that a partnership had been found to exist between the petitioner and George Scott; the Court of Appeals said "we disagree". And then the Court proceeded to review what the District Court had found on the first trial (in Equity Cause No. 639) and what the Court of Appeals had concluded on the first appeal in said case (84 Fed. 2d 489). The Court of Appeals then reviewed the proceedings, findings and judgments on the second trial thereof and said that the same had been properly rendered. The Court of Appeals then reviewed the subsequent proceedings, originally initiated in 1941 by petitioner in the State Court and which were transferred to the Federal Court and became therein "Civil Action No. 6068, Irene Smith Cliett, et vir, v. Jeff Scott, et al.", and the two prior appeals in said Cause No. 6068. And in connection therewith, the Court of Appeals herein merely held that that court had theretofore affirmed the findings and judgment of the trial court precluding petitioner's claim of acquisition of these respondents' title to an undivided one-half interest in the lands decreed to them in Equity Cause No. 639; and said that its opinion that the prior determinations and judgments upon such proposition were correct.

The opinion of the District Court which found and held that, as a matter of law, petitioner was not entitled to recover the undivided one-half interest of these respondents in and to the land constituting the subject matter of Equity Cause No. 639 and therein decreed to them, under petitioner's claim of adverse limitation and the applicability of the Texas Statute of limitation, is found at pages 66-64 of the Petition for Writ of Certiorari now before this Court. Among other things which the

District Court held precluded the petitioner from recovering under such claims, it is clear the Court considered the answer and cross-action of these respondents, filed in the State Court on September 29, 1947, wherein they cross-claimed against the petitioner for the rents and profits of one-half of such lands subsequent to the disposition of the last appeal in Equity Cause No. 639 (March 14, 1939); the supplemental petition filed by petitioner in the State Court on October 17, 1947, wherein they joined issues with these respondents on their said answer and cross-action, and the petitioner's prayer thereto affixed, as well as the (superseded or abandoned) original petition filed in the State Court by petitioner on March 7, 1941. Therefore, petitioner's contention that the District Court considered only her superseded pleadings in granting summary judgment against her on her claim of adverse possession, is not consonant with any fair construction of the opinion of the Court originally so holding.

The summary judgment of the District Court denying petitioner's recovery of these respondents' interest in the subject lands was rendered February 19, 1952 (103 Fed. Supp. 440) and was affirmed by the Court of Appeals May 15, 1956. And although the petitioner sought from this Court a Writ of Certiorari to that court upon that judgment, she did not therein complain to this Court of the judgment of the District Court so denying her adverse claim or that part of the judgment of the Court of Appeals so affirming such summary judgment (No. 439, Irene Smith Cliett, et vir, petitioners, v. Jeff Scott, et al., respondents, 352 U.S. 917, 77 S. Ct. 215).

It is noted by respondents that the petitioner "sandwiched" in her discussion under her Points V and VI a

challenge of the correctness of the judgments of the District Court, the Court of Appeals and of this Court in overruling her motion to remand Civil Action No. 6068 to the State Court (233 Fed. 2d 269. Cert. den. 352 U.S. 917, 77 S. Ct. 215). This seems to be an imposition upon this Court, since the same matter has been by it heretofore considered.

Conclusion

The United States Court of Appeals, Fifth Circuit, committed no error in affirming the judgment of the District Court dismissing petitioner's motion for relief under Rule 60(b); and the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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Certificate of Service

I, W. H. Betts, attorney for respondents, Mamie S. Hammonds, Reed Scott and Essie F. Scott, do hereby certify that I have on this_____day of June, A. D. 1961, duly mailed a copy of this reply to the Petition of Irene Smith Cliett for Writ of Certiorari in this said cause (as printed) to each of the hereinafter listed attorneys for petitioner and respondent, Bertha Scott:

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and such mailing was done in conformity with law and requirements of Rule 33 of the Supreme Court.

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